



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2005

Ms. Sharon Alexander
Associate General Counsel
125 East 11th Street
Austin, Texas 78701-2483

OR2005-00657

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 217124.

The Texas Department of Transportation (the "department") received a request for various types of information pertaining to the toll road plan approved by the Capital Area Metropolitan Planning Organization ("CAMPO") on July 12, 2004, including toll road diagrams, revenue studies, environmental studies, contracts, and correspondence between the department and CAMPO or other governmental bodies. You state, and provide documentation showing, that you notified PBS&J and Kimley-Horn and Associates, Inc. ("Kimley-Horn") of the department's receipt of the request for information and of the right of each company to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You claim that the requested information is excepted from disclosure under sections 552.101, 552.105, 552.107, 552.111, 552.116, and 552.137 of the Government Code. You also indicate that some of the requested preliminary documents in Exhibit B may also be excepted under section 552.110, but take

no position as to whether this information is excepted under that section. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that section 552.022 of the Government Code is applicable to some of the information in Exhibit E. Section 552.022 provides in relevant part the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code §552.022(a)(1), (3). The submitted documents include completed reports and information in an account, voucher, or contract relating to the expenditure of public funds by the department. Sections 552.105 and 552.111 of the Government Code are discretionary exceptions and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 564 (1990) (governmental body may waive statutory predecessor to section 552.105); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Accordingly, the department may not withhold these documents under section 552.105 or 552.111.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither PBS&J nor Kimley-Horn has submitted to this office its reasons explaining why the requested

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. We also note that you failed to assert section 552.137 within the ten-business-day period mandated by section 552.301(a) of the Government Code. Although you did not timely raise section 552.137, this provision can constitute a compelling reason to withhold information, and we will address your arguments on this issue. *See* Gov't Code §§ 552.301, 552.302.

information relating to it should not be released. Consequently, neither company has provided this office with a basis to conclude that its responsive information is excepted from disclosure. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that you may not withhold any portion of the submitted information relating to PBS&J or Kimley-Horn on the basis of the proprietary interests of either company.

You assert that the information not subject to section 552.022 in Exhibit E is excepted under section 552.105 of the Government Code. Section 552.105(2) excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision Nos. 357 at 3 (1982), 222 (1979). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You state the department has made a good faith determination that the remaining information in Exhibit E relates to the appraisal or purchase price of real property that the department intends to purchase. Further, you explain that the release of this information may harm the department's ability to negotiate. Based on your representations and our review of the information at issue, we conclude that the department may withhold under section 552.105 the information we have marked in Exhibit E that is not subject to section 552.022. However, we find that the remaining information does not relate to the appraisal or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property; therefore, the department may not withhold any of the remaining information at issue under section 552.105.

You assert that the information in Exhibit D is excepted under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records

Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The department asserts that the information in Exhibit D is a confidential communication between an attorney for and employees of the department made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we agree that this information consists of a privileged attorney-client communication that the department may withhold under section 552.107.

You assert that the information in Exhibit C is excepted under section 552.116 of the Government Code. Section 552.116 provides the following:

- (a) An audit working paper of . . . the auditor of a state agency . . . is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform us that the information in Exhibit C relates to an audit authorized by state law. *See* Transp. Code §201.108; *see also* Gov't Code ch. 2102 (providing general method for a government body to conduct an audit). You state that the submitted information "was compiled during the course of a formal audit conducted by a [department] internal auditor." After reviewing the information at issue, we conclude that the information consists of audit working papers for purposes of section 552.116; therefore, the department the information in Exhibit C under that section.

You assert that the information in Exhibit B is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You inform us that the some of the information at issue in Exhibit B consists of pre-decisional communications between the department and the Federal Highway Administration (the "FHA") and similar federal and state transportation agencies. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

You indicate that the information in Exhibit B contains preliminary engineering documents, draft environmental documents, pre-decisional communications between the department and federal authorities, and interagency and intraagency communications. You inform us that the engineering documents "are draft engineering products [and] the results of these products are used for planning purposes, which is a policy function." You also inform us that the information in the environmental documents "consists of internal drafts that are rife with advice, opinions, and recommendations concerning proposed policies." You state the preliminary engineering and environmental documents have not been released in their draft forms, but we understand that they will be made available to the public in their final forms. *See* 23 C.F.R. § 771.119 (providing for public inspection of environmental assessment). You also inform us that the information in the communications between the department and the FHA "was shared under the governmental entities official capacity as decision makers for this project" and that "[t]hese entities and officials share privity of interest and common deliberative processes for the purpose of planning public projects of huge magnitude." Based on these representations and our review of the information in question, we find that the department may withhold the information that we have marked in Exhibit B under section 552.111. However, we conclude you have not demonstrated that any of the remaining information at issue is excepted from disclosure under section 552.111.

For the remaining information in Exhibit B, we will address your argument under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. Section 201.205 of the Transportation Code provides, in relevant part, that the department may "apply for, register, secure, hold, and protect under the laws of the United States, any state, or any nation

a patent, copyright, trademark, or other evidence of protection or exclusivity issued in or for an idea, publication, or other original innovation fixed in a tangible medium[.]” Transp. Code § 201.205(a). The department argues that section 201.205 “applies to its intellectual property for copyrighted and/or trademark documents” in Exhibit B.² However, you do not demonstrate, and it does not otherwise appear to this office, that section 201.205 makes any of the information at issue confidential. Therefore, the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 201.205.

The department asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses we have marked under section 552.137.

We note that the remaining information contains bank account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The department must, therefore, withhold the bank account numbers we have marked under section 552.136.

To conclude, the department may withhold (1) the marked information in Exhibit B under section 552.111, (2) the information in Exhibit C under section 552.116, (3) the information in Exhibit D under section 552.107, and (4) under section 552.105, the information in Exhibit E that is not subject to section 552.022. The department must withhold the marked bank account numbers under section 552.136 and the marked e-mail addresses under section 552.137. It must release the remaining information at issue. Because this ruling is dispositive, we do not address your other arguments for exception.

²The department asserts section 201.206 of the Transportation Code, which relates to the right of the department to accept contributions and donations. We assume the department intended to instead assert section 201.205.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

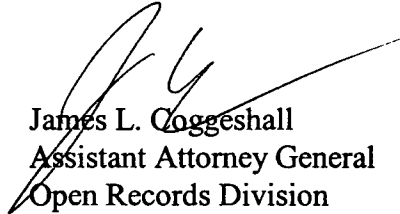
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 217124

Enc. Submitted documents

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